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Supreme Court, U.S.
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No. 95-2085

In The

Supreme Court of the United States

October Term, 1995

TIMOTHY DURKIN; JOHN DURKIN; NICHOLAS BONELLI,
Petitioners,

vs.

MAJOR LEAGUE BASEBALL; NATIONAL FOOTBALL LEAGUE; NATIONAL BASKETBALL ASSOCIATION; NATIONAL HOCKEY LEAGUE; COLUMBIA BROADCASTING SYSTEM, INC.; AMERICAN BROADCASTING COMPANIES, INC.; NATIONAL BROADCASTING COMPANY, INC.; ESPN SPORTS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; FOX BROADCASTING, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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9 pp

TABLE OF CITATIONS

New cases cited:

Bell v. Hood, 327 U.S. 678 (1946) 6

California v. American Stores Co., 110 S.Ct. 1853 (1990)..... 2,3

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)..... 1

Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209 (6th Cir. 1989)..... 5

International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1958)..... 2

Petitioners to this point have demonstrated both: 1) that the plain language of the Sports Broadcasting Act (SBA) and its legislative history reveal that the legislature did not intend to protect collective agreements between professional sports leagues and cable television networks; and 2) that legal precedent and Title 15 U.S.C. § 16(a) support a prima facie case that the challenged agreements violate the antitrust laws.

This Court has consistently held that the antitrust laws should be enforced vigorously. "We have maintained, throughout our cases, that our interpretation of § 4 cases must promote the vigorous enforcement of the antitrust laws." *Kansas v. Utilicorp*, 497 U.S. 199, 214 (1990). Despite this well established interest in enforcing the antitrust laws, the Third Circuit denied Petitioners remand to the district court even on the issue of injunctive relief.

In rejecting Petitioners' request for injunctive relief, the Court ignored its own recognition just three weeks earlier that: "In *Mid-West Paper*, we expressly rejected the contention that the direct purchaser rule bars injunctive relief under section 16 as well as treble damages suits under section 4." *McCarthy v. Recordex*, 80 F.3d 842, 856 (3d Cir. April 4, 1996)(citing to *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). The Third Circuit's inconsistent decisions in *Merican, Inc. v. Caterpillar*, 713 F.2d 958 (3d Cir. 1984), *Lower Lake Erie*, 998 F.2d 1144 (3d Cir. 1993), *McCarthy v. Recordex*, 80 F.3d 842 (3d Cir. 1996), and the instant case not only chill enforcement of the antitrust laws, but promote circumstances where even a willful violation of special interest antitrust legislation may not be prosecuted.

When industries violate their own special interest antitrust statute, this Court has seen fit to withdraw the statutory protection altogether. See *Case-Swayne v. Sunkist Growers, Inc.*, 389 U.S. 384 ((67); *National Broiler Ass'n. v. United States*, 436 U.S. 816 (1978); *and Group Life & Health v. Royal Drug Co.*, 440 U.S. 205 (1979). Respondents have not disputed Petitioners' claim that games which have been sold by way of collective agreements have been televised on cable television networks.

Not only have Respondents engaged in conduct beyond the statutory protection of the SBA, but they seek to defend their conduct by relying on the fact that the unauthorized agreements have rendered Petitioners "indirect" by injecting local cable operators into the distribution chain. See *NCAA v. Board of Regents*, 468 U.S. 85, at 111 (1984)(where the Court citing *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1958), concluded that viewers of college football games on broadcast television are the relevant consumers of the product.)

Even assuming the Court allows Respondents to transform Petitioners into indirect purchasers by way of illegal agreements, *Illinois Brick* merely denies direct reimbursement to indirect victims. It does not prohibit disgorgement.

Indeed, Petitioners' right to disgorgement is encompassed within their right to injunctive relief. *California v. American Stores Co.*, 110 S.Ct. 1853, 1859 (1990). "Divestiture has been called the most important of antitrust remedies." *American Stores*, at 1859. Moreover, § 16 of the Clayton Act "states no restrictions or exceptions to the forms of injunctive

relief a private plaintiff may seek, or that a court may order." *American Stores,* at 1859.

Disgorgement through *cy pres.*

Petitioners have maintained throughout this litigation that they were indifferent to how the illegal windfall profits were distributed. *Illinois Brick* supports Petitioners' indifference by establishing that: "From a deterrence standpoint, it is irrelevant to whom damages is paid, so long as someone addresses the violation." *Illinois Brick,* at 746.

To maintain symmetry with *Illinois Brick*, Petitioners proposed a *cy pres* distribution which reimburses direct purchaser local cable operators, and allows for vindication of the antitrust laws. Respondents cannot oppose awarding standing to Petitioners on grounds that more direct purchaser local cable operators have suffered harm, and then oppose a *cy pres* distribution to those same local cable operators.

Moreover, a *cy pres* distribution to local cable operators forecloses any potential for duplicate recovery by direct purchasers, and presents no greater complexity than a suit brought by direct purchaser local cable operators. In addition to addressing the two *Illinois Brick* concerns, a *cy pres* distribution to local cable operators also provides an opportunity to indirectly benefit Petitioners. Petitioners could benefit through re-regulation of the cable television industry under the 1992 Cable Act. In light of such regulation, it is possible that "...regulators would require the utilities [cable television industry] to pass on at least some of the recovery obtained in a §4 suit." *Kansas v. Utilicorp*, 497 U.S. 199, 212

(1990).

Petitioners' antitrust injury.

Petitioners note that in addition to causing Petitioners to pay higher cable television rates, the challenged pooled agreements between professional leagues and cable television networks also reduce the output of telecasts on *free broadcast television* which remains the limited focus of the SBA.

Respondent broadcast network CBS (or any other national broadcast network), which reaches approximately thirty million more households than cable television networks, presently owns no telecasting rights to professional sporting contests between clubs in the NFL, NBA, NHL, or Major League Baseball. Given the extreme popularity of professional sports, it is implausible that CBS would have no interest in bidding on the challenged pooled television packages eventually sold to cable networks. Thus, any league television package sold by pooled agreement to ESPN or Turner, without providing CBS an opportunity to bid on the package, represents a pooled agreement outside the scope of the SBA which reduced output on free broadcast television.

Discovery would reveal whether CBS was provided an opportunity to bid on the telecasting rights contained in pooled agreements between leagues and cable networks, or if the leagues "set aside" these games for cable, or pay-television only. If the leagues did "set aside" certain packages for cable networks, then these set asides reduce output of telecasts on free broadcast television while increasing Petitioners' monthly cable television rates.

Even assuming national broadcast television networks were given the opportunity to bid on the leagues' pooled packages, and the leagues sold games by way of pooled agreements to ESPN and Turner because the cable networks offered the highest bid, then the leagues entered into collective agreements outside the scope of the SBA for the purpose of: 1) increasing profits, and 2) reducing output by thirty million households.

Finally, Petitioners request that certiorari be granted to resolve the inconsistencies in antitrust standing analysis applied by the federal courts. See *Lower Lake Erie (employed* the AGC analysis) , *McCarthy v. Recordex*, 80 F.3d 842 (3d Cir. 1996) *(*did not use the *AGC* analysis*), Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209 (6th Cir. 1989) (used AGC test). Petitioners believe that the bar would benefit by this Court clarifying the doctrinal relationship between *Illinois Brick* and *Associated General Contractors.*

In *McCarthy v. Recordex,* the Third Circuit held that absent concerns for duplicate recovery antitrust standing is to be determined by the five part *AGC* test employed in *Lower Lake Erie. "Lower Lake Erie* is fully distinguishable. In *Lower Lake Erie,* we found that the plaintiffs' claims did not involve 'the particular kind of double recovery *Illinois Brick* sought to prevent.'" *McCarthy v. Recordex*, 80 F.3d 842, 851 (3d Cir. 1996). Under Petitioners' proposed *cy pres* distribution to direct purchasers, there is no potential for duplicate recovery.

"Where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to make good the wrong done." *Bell v. Hood,* 327 U.S.

678, 684 (1946). While a *cy pres* distribution of damages to local cable operators would not implicate the dual concerns expressed by this Court in *Illinois Brick*, it would require Respondents to forfeit their illegally obtained revenues. It would also allow the antitrust laws to be enforced.

Wherefore, Petitioners again respectfully ask this Court to grant certiorari to review Petitioners' requests for both injunctive relief and standing to pursue treble damages against Respondents for their deliberate violation of the Sports Broadcasting Act.

Respectfully submitted

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